

ARROWAY ESTATE AGENTS  
versus  
ROCK INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE  
CHITAKUNYE J  
HARARE, 18 July 2016 and 21 June 2017

**Civil trial**

*R. Maganga*, for the plaintiff  
*M. Chasakara*, for the defendant

CHITAKUNYE J: The plaintiff is a duly registered Estate Agent with the Estate Agent Council of Zimbabwe.

The defendant is a duly registered company in terms of the laws of Zimbabwe.

On the 5<sup>th</sup> May 2014 the plaintiff sued the defendant in this court claiming from the defendant:

1. Payment in the sum of \$ 30 000.00 being agents' commission for a property duly sold at the instance of the defendant.
2. Interest on the said \$30 000.00 from the date of demand being the 28<sup>th</sup> of February 2013 to the date of payment in full.
3. Costs of suit.

The plaintiff alleged that on the 24<sup>th</sup> January 2013 the plaintiff and the defendant entered into a written contract whereby the plaintiff was given a mandate to source buyers for the defendant's property namely Stand 119 Northwood Township of Sumben in the district of Salisbury (Harare) also known as Mashanda Flats.

In furtherance of the agreement the plaintiff secured a buyer on behalf of the defendant in the form of ZB Financial Holdings Group Pension Fund. An agreement of sale was duly entered into between the defendant and the buyer in terms of which the property was purchased for the sum of \$623 000.00 on the 11<sup>th</sup> February 2013.

The plaintiff alleged that it was a term of the agreement that the plaintiff would be paid 5% Agents' Commission on signing of the agreement of sale between the purchaser and the defendant.

Transfer in respect of the property was effected into the purchaser's name on the 6<sup>th</sup> May 2013.

The plaintiff further alleged that as it had performed its mandate it was entitled to the commission. However, despite demand for the commission, the defendant has refused or neglected to pay the commission. It is in these circumstances that the plaintiff sued the defendant for the sum of \$30 000.00 plus interest.

The defendant, on the other hand, contended that it never gave the plaintiff the mandate to sell its property. Further, that the supposed representative of the plaintiff who purported to secure a mandate to sell the defendant's property acted fraudulently in securing the mandate. That person represented that he was an employee of the plaintiff when he was not and to the plaintiff he represented that he was an employee of the defendant when he was not. In the circumstances there was no valid mandate.

The defendant also contended that in terms of the purported mandate, commission was to be paid by the purchaser. The plaintiff then unilaterally changed that part of the mandate as parties were not *ad idem*.

The defendant's defence was further to the effect that the sale was concluded without the input of the plaintiff as the agreement of sale was prepared by the purchaser's legal practitioners.

It was clear from the pleadings that the parties were not agreed on the status of the agreement between them.

On the 2<sup>nd</sup> March 2015 a pre-trial conference was held at which the only issue referred to trial was:-

Whether or not there was a contractual relationship between the parties.

Two witnesses testified for the plaintiff whilst one witness testified for the defendant. The plaintiff's first witness was its Director, Felix Tangawarima (hereinafter referred to as Felix). Felix's evidence was to the effect that in January 2013 the defendant, through one of its directors Cara Gilboy, approached the plaintiff. Cara Gilboy, herein after referred to as Cara, was in the company of a man whose name he later learnt to be Richard Karichi. Cara indicated to the plaintiff that the defendant had a property it wanted to be sold. As is

customary, the plaintiff through its employee Mildred Tandadzi, gave Cara an Instruction Form for the defendant to complete in instructing the plaintiff to sell its property.

Cara left with the form. She later returned the form duly completed. This was now on the 24<sup>th</sup> January 2013.

The person who had filled the form on behalf of the defendant had amended a standard clause on the payment of commission so as to provide that the purchaser would pay the commission. The original clause was to the effect that the seller was to pay the commission.

As this amendment was not in tandem with the dictates of the Estate Agent Act, the plaintiff wrote a letter to the defendant on the 25<sup>th</sup> January advising that in terms of the Estate Agent Act, commission was to be paid by the seller as the giver of the mandate to sale to the agent. According to Felix the agreement was between the seller and the agent. That letter was received by the defendant on the same day but defendant did not respond to it.

The plaintiff's negotiator Mildred Tandadzai proceeded to show the prospective buyer the defendant's property in the presence and with the direction of Cara Gilboy. On the first day she could not have access to all the flats and so she had to go with the buyer on the 2<sup>nd</sup> day which was a Saturday; again Cara was in attendance as Mildred was showing the buyer around.

After showing the buyer and negotiating with the buyer, the buyer made a written offer of \$600 000.00 which the seller accepted. It was Felix's evidence that in terms of the instructions the commission was a 5% of the purchase price hence the figure of \$30 000.00 being claimed based on the price the buyer had offered at that stage.

It was also his evidence that after the acceptance of the offer the seller did not proceed to write a formal acceptance letter. The plaintiff nevertheless prepared a draft agreement of sale which it sent to the seller but this was not returned. Later he learnt that the property had been sold to the buyer they had introduced for \$623 000.00.

Mildred Tandadzai, the plaintiff's sales negotiator, confirmed Felix's evidence in some material way. She confirmed that in January 2013 Cara came in the company of a man she later learnt was Richard Karichi. Cara indicated that the defendant had a property for sale. Mildred confirmed that she is the one who dealt with Cara and gave the said Cara the instruction form to complete. Cara indicated that she had to take it for her colleague to go and complete. When Cara returned the form it was fully completed serve that the person who completed it had altered one standard clause on who was to pay the commission.

Mildred further confirmed that the instruction form was returned on the 24th January 2013 and on the 25<sup>th</sup> January 2013 the plaintiff wrote a letter to the defendant pointing out that in terms of the law it is the person who gives the mandate who has to pay the commission, in this case it is the defendant to pay the commission and not the buyer.

Mildred further confirmed that she later took the representatives of the prospective buyer to view the property. At the property they found Cara waiting for them. On the first day they could not have access to all the flats and so they returned on a Saturday to complete the viewing. This was again in the presence of defendant's representative Cara.

After the buyer's representatives had shown interest to buy she negotiated with them and they made an offer of \$600 000.00 by way of a letter to the seller. The offer was accepted by the seller. Mildred said that she then prepared an agreement of sale and sent copies thereof to the defendant for signing. To her knowledge the defendant never returned the draft agreement of sale she had given to Cara. Later she learnt that the sale had in fact gone through and ZB Financial Holdings Group Pension Fund had taken transfer.

The plaintiff's evidence shows that upon being approached by Cara in the company of another man, Mildred gave an instruction form to Cara and she later returned it duly completed albeit with an amendment. That form was signed by J K Hensman as the person giving instructions to plaintiff on behalf of the defendant. Cara signed as witness to the giving of the instructions. The witnesses confirmed they dealt with Cara and not this other person Richard Karichi.

Under cross examination both witnesses maintained that the instruction form was handed over to Cara and was returned by Cara. That instruction form was clear that defendant was giving instruction to plaintiff for plaintiff to source buyers for its property.

In as far as the allegations that Richard Karichi fraudulently misrepresented that he was plaintiff's employee, the witnesses categorically stated that not only was he not the plaintiff's employee but on the occasion they saw him in the company of Cara, he never made such a representation. Whilst accepting that they learnt that at some point Richard had made an offer for the property in question, they were both in unison that they did not know who had given him the mandate form on which such offer was made. In any case the offer by this Richard was not accepted by the defendant.

The defendant's evidence was testified to by Kumbirai Josephat Mautsa (hereinafter referred to as Kumbirai). He is one of the defendant's directors. His evidence was to the effect that on about 12 January 2013 a man by the name Richard Karichi came to the

defendant's offices saying that he worked for Arroway Estate Agents and he wanted to make an offer for the defendant's property, Mashanda flats. At that time he made an offer of \$675 000.00. The defendant did not accept the offer because they did not know him and they had not given him a mandate. They asked him to bring a mandate form. On the 14<sup>th</sup> the said Richard came with a Mandate form in the name of the plaintiff. This Richard had gone on to indicate that the plaintiff had been mandated by a buyer to source for property and so that buyer would in effect be the one to pay the commission. It was on that understanding that the defendant's representative, J K Hensman, amended the clause on who was to pay the commission to now provide that the purchaser was to pay the agent's commission. The defendant duly signed the mandate form. It was Kumbirai's evidence that one of its directors, Cara, went together with Richard to submit the form to the plaintiff.

As far as the defendant was concerned, therefore, the agreement was that whilst it gave a mandate to plaintiff to sell its property, the agents' commission in respect of such a sale was to be met by the purchaser. Kumbirai accepted that after submitting the mandate form on 24 January 2013, on the 25<sup>th</sup> January 2013 the defendant received a letter from the plaintiff indicating that the agents' commission was to be paid by the seller. This is the letter already referred to above. Despite the clear language in the letter the defendant did not respond to that letter. Instead it allowed the plaintiff to proceed in sourcing a buyer and within a week the buyer was secured. Kumbirai admitted that the Plaintiffs' representative took the buyer for viewing of the property after which the plaintiff submitted a draft agreement of sale. The defendant did not at any time stop the plaintiff from proceeding. He also did not dispute that Cara was in fact the defendant's representative in this transaction and that she had gone to the property for the prospective buyers sourced by the plaintiff to view the property. He also confirmed that when the buyer made its offer through the plaintiff defendant accepted that offer hence the draft agreement of sale. On why the defendant was now refusing to pay the commission Kumbirai said that it was because there was no contractual agreement for Arroway Estate Agents to sell the property.

The reasons he gave for asserting that there was no contractual agreement were that the parties were not ad idem on the issue of who was to pay the agent's commission and also that Richard Karichi had turned out to be a fraudster yet he was the one who had purported to represent the plaintiff in this transaction.

Under cross examination Kumbirai confirmed that Cara was the defendant's representative in this transaction. He thus could not dispute the following: that the

Instruction Form was handed to Cara Gilboy by Mildred as what Mildred had said; that it was Cara who dealt directly with the plaintiff; and that it is Cara who returned the Instruction Form to the plaintiff as testified to by Mildred.

He also confirmed that after receiving a letter from the plaintiff on 25 January the defendant did not respond to it at all the reason being that it contradicted the 1<sup>st</sup> agreement. In spite of this contradiction defendant did not deem it fit to stop the plaintiff from proceeding with showing the prospective buyer the property; negotiating the price and drawing up an agreement of sale. The defendant did not withdraw its mandate to the plaintiff and instead provided its representative to be present and to facilitate the viewing of the property by prospective buyers sourced by the plaintiff.

The issue as outlined above pertains to the contractual relationship between an estate agent and a seller of immovable property.

In *Ronstan Investments (Pty) Ltd and Another v Littlewood* 2001(3) SA 555(SCA) NUGENT JA described the relationship of estate agents and the seller of a property as follows:

“[1] The appointment of an estate agent to find a purchaser for immovable property in return for a commission, without more, places the agent under no contractual obligations. The contract is merely a promise, binding upon the principal, to pay a sum of money upon the happening of a specified event.

While the estate agent assumes no obligations under his contract with the seller of the property, equally, in this relationship *sui generis*, the seller is not obliged to accept any of the buyers that the estate agent may find. The seller is simply bound to pay the agents’ commission where the agent does find a prospective buyer. See *Bird v Sumerville and Another* 1961(3) SA 194.”

In R H Christie in *Business Law in Zimbabwe* 1 ed p336 the author describes an estate agent in these terms:

“An Estate Agent is sometimes said not to be an agent at all, as he does not conclude a contract on behalf of his principal and does not undertake a mandate. This is true as far as it goes but .... He is treated as an agent for some purposes ....

His normal method of operations is to receive instructions from a prospective seller of immovable property and to endeavour to find a prospective buyer, whom he introduces to the seller ... Of course, there is nothing to prevent a seller instructing an estate agent to conclude the sale on his behalf, but the presumption that the ordinary relationship is intended is so strong that instructions to ‘sell’ or to ‘go ahead and prepare ‘ the agreement to clinch the sale’ will not be interpreted as authorising an estate agent to conclude the sale.”

See also *Guest and Tanner (Pvt) Ltd v Lynch* 1964 RLR 252at 256-7.

The unique relationship between the estate agent and the seller was also alluded to in *Katsande v Rumani Real Estate (Pvt)Ltd* 2009(2)ZLR 196 wherein at 199C- MAKARAU JP(as she then was) had this to say:

“I believe that the relationship between the estate agent and the seller, whilst not arising in this application, is a good starting point. While it is legally correct that an estate agent and the seller of the property are in an agent – principal relationship, the Roman-Dutch Law of agency has since adopted the position obtained in English Law that places the estate agent in a position *sui generis*.

Prof. Ellison Khan in an article in (1980) 97 SALJ 342 describes the estate agent as a ‘legal oddity’. This is easy to understand as, generally speaking, an estate agent is not an agent *strictu sensu*, clothed with authority to transact fully on behalf of his principal. An estate agent is merely mandated to find a prospective purchaser of the seller’s property. After accepting the mandate, he or she is under no obligation to find a purchaser and no action will lie against him or her for failing to find a purchaser or for finding a purchaser who will not eventually go through with the sale. After finding a prospective purchaser, he or she is not clothed with authority to bind his or her principal in the sale agreement. Hence his or her oddity as an agent *strictu sensu* would not be thus restricted.”

It is thus apparent that the nature of the relationship of estate agent and seller must be viewed in its own light. *In casu*, it is common cause that the defendant completed an Instruction to sale form that had been supplied by the plaintiff. That form had some standard clauses and blank spaces defendant was to complete. The first part of the completed form reads as follows...

“I, the undersigned J K Hensman hereby instruct ARROWAY ESTATE AGENTS to act as my/our sole Agents for the purpose of Selling/managing for the following property: “

It is clear that defendant was instructing the plaintiff to act as its agent for the purposes of selling its property. I did not hear the defendant’s witness to deny that that clause is instructive on the mandate being given by defendant to plaintiff.

Having so mandated the plaintiff the defendant was informed on that same form that it would pay the agents commission in these terms:

“I undertake to pay the company fees for their services based on the current minimum scale of fees of the Auctioneers Estate Agents and Valuers Institute or Estate Agents Council or I undertake to pay them the sum of .... as their commission. Which I understand is above minimum scale of fees.”

This is the clause the defendant unilaterally amended to read, *inter alia*, that “the purchaser to pay the agents commission.”

As this is the only portion amended it follows that even going by the defendant's version, there is no doubt that defendant gave a mandate to plaintiff to secure prospective buyers for its property.

As has already been alluded to above the plaintiff secured a prospective buyer who was accepted by the defendant. In terms of its mandate, plaintiff duly performed. As aptly noted in the authorities cited the plaintiff only had to find a prospective buyer for the property to earn its commission. That commission would ordinarily come from the seller as the giver of the mandate.

The defendant's contention that the commission should be paid by the buyer failing which there is no contract between defendant and plaintiff is in my view not meritable. Firstly having given the plaintiff the mandate, the defendant was aware of the plaintiff's condition for the mandate which was that the seller had to pay the agent's commission. The defendant's attempt at amending that term was rejected by plaintiff as being contrary to the laws and regulations that govern estate agents. In its letter of the 25<sup>th</sup> January plaintiff advised the defendant that:

"According to Estate Agent Council Act (*sic*) the agent's commission must be paid by the seller, because the seller gives the agent the mandate either to sell the property or to manage, therefore, the agreement is between the seller and the agent not with the buyer. Arroway Estate Agent is to abide to the law of the country, any deviation from the country's laws; we will be liable to the Act. Looking forward to hearing from you soon."

After receiving the above letter which was clearly to the effect that the seller was to pay the agents commission, the defendant through its representative , Cara, proceeded to facilitate showing of the property to the prospective buyer by the plaintiff's representative after which the plaintiff conveyed the buyer's offer to the defendant and the defendant accepted that offer. The defendant in fact signed an offer letter from the buyer after which it received a draft agreement of sale from the plaintiff. Kumbirai confirmed that during all the occurrences after the receipt of the plaintiff's letter of 25 January, the defendant never informed the plaintiff that it had either cancelled or withdrawn its mandate due to a failure to agree on who was to pay the commission.

I am of the view that the defendant's conduct after the receipt of the letter of 25 January showed that it accepted the condition as stated by the plaintiff and it was willing to let the plaintiff secure a prospective buyer for its property on those terms. There was by



virtue of conduct a clear meeting of the minds. The defendant clearly consented to the plaintiff acting on its behalf in securing a buyer.

It was thus mischievous of the defendant to turn around after the plaintiff had performed to now contend that there was no contract between the parties because of a failure to agree on who was to pay the commission.

It is my view that had the defendant been sincere in its contention that Richard had misrepresented that he was representing the plaintiff and that this same Richard had stated that the buyer would pay the commission, upon receipt of the letter of 25 January defendant would have protested to plaintiff clearly disclosing that Richard had indicated that the buyer was to pay the commission.

In stating the above I am mindful of the fact that there are circumstances when an estate agent may not be entitled to payment of a commission from the seller. These include situations where the estate agent takes the initiative by approaching the owner of property to ascertain whether he is interested in selling it and at what price. In such a situation the agent is not entitled to assume that by answering in the positive the seller has also agreed to pay commission for finding a buyer. There would need to be clear agreement on commission. (*Bosch v Flower Box (Pty) Ltd* 1971(4) SA 640(E).

Similarly where an estate agent is approached by a buyer and then persuades the owner of a property to sell he may not be entitled to a commission. (*Botha v Smit* 1976(4) SA 885(A).

*In casu*, the plaintiff's case was basically that it was approached by the defendant's representative with instructions to source for a buyer. The defendant was given a mandate form to fill showing clearly the commission was to be paid by the defendant. The witnesses confirmed that the defendant concluded an agreement of sale with a buyer introduced by the plaintiff and that plaintiff was the principle catalyst to the agreement of sale.

It may also be noted that the buyer confirmed in its letter to the plaintiff of 21<sup>st</sup> March 2014 that it was introduced to the seller by the plaintiff.

The defendant's contention that Richard had made a misrepresentation to it does not hold much water. The assertion that Richard approached defendant with an offer of \$675 000.00 on 12<sup>th</sup> January 2013 and purporting that plaintiff had been mandated by a buyer to source for a property of the description of defendant's property is itself highly improbable. The defendant's witness stated that they had not advertised the property for sale in any media. He could not say how this Richard or the plaintiff could then have known that the defendant

was intent on selling its property. Equally after turning down an offer of \$675 000.00 purportedly from plaintiff, the witness was unable to explain how defendant readily accepted a reduced offer of \$600 000.00 from the same plaintiff. I raise this because according to defendant's version these offers were emanating from the same buyer who had already been secured by the plaintiff.

The other aspect to note is that the instruction form that created a relationship between plaintiff and the defendant is the one that was handed to Mrs Cara Gilboy and which she later returned. The instruction from defendant said Richard had and which plaintiff's witnesses said they were not aware of how he could have acquired it, was not part of the evidence tendered and it was for Richard and Mrs Cara Gilboy to explain how that form may have found its way to Richard since plaintiff's witnesses were clear that they only gave one form to Mrs Cara Gilboy at the time she came in the company of a man they were later informed was Richard. That form in any case was not the basis of the plaintiff's claim. The offer that Richard had made pursuant to that form was not accepted by the defendant.

Whilst appreciating that fraud can vitiate a contract, in *casu*, the alleged fraudster was not connected to the plaintiff. From the inception the offer by that person was rejected. After that rejection the defendant dealt with the true representative of the plaintiff in the name of Mildred Tandadzai.

Mrs Cara Gilboy, as the defendant's representative, knew who had given her the Instruction Form and to whom she had delivered the completed form. As she did not testify it means such information remained with her. She would have been better placed to explain how she came to approach the plaintiff's offices in the company of this man. The defendant's witness could not testify on such aspects as he was not there.

In the circumstances I am of the view that the mandate was valid to the extent that it mandated the plaintiff to source a buyer for defendant's property. It cannot thus be said the contract was void *ab initio*. The defendant through Cara knew it was dealing with Arroway Estate Agent as represented by Mildred Tandadzai.

The circumstances of the case show clearly that after the plaintiff had secured a willing and able buyer, whose offer had been accepted by the defendant, the defendant decided to complete the transaction behind the plaintiff's back in a bid to avoid paying the agents commission. At that time the defendant was fully aware from the plaintiff's letter of the 25<sup>th</sup> January that its desire for the purchaser to pay the commission had been rejected as being contrary to law and it would thus be liable to pay the commission.

It is trite that an agent has a right to be paid his commission if it is established that he was the effective cause of the sale. This is so even where the sale goes through after he has ceased active participation or where the sale is concluded directly between the parties; or even where the sale eventually goes through on different terms and conditions. See *The Law of Agency in South Africa* by de Villiers & Macintosh, 3<sup>rd</sup> ed by J M Sikke p 363

In the circumstances the defendant is liable to pay the agent's commission.

Accordingly the defendant is hereby ordered to pay the plaintiff:

1. The sum of US\$ 30 000.00 being agents' commission due in respect of the sale of Stand number 119 Northwood Township of Sumben, Harare
2. Interest in the above sum of US\$30 000.00 at the prescribed rate from the 28<sup>th</sup> February 2013 to the date of payment in full.
3. Costs of suit.

*Maganga and Company*, plaintiff's legal practitioners  
*Gunje & Chasakara Law Firm*, defendant's legal practitioners